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No. 95-1363

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

In Re:

IRFM, INC., A CALIFORNIA CORPORATION, FORMERLY DBA IRVINE RANCH FARMERS MARKET,

Debtor.

ROBERT P. MOSIER, CHAPTER 7 TRUSTEE FOR THE BANKRUPTCY ESTATE OF IRFM, INC.,

Petitioner,

vs.

THE KROGER COMPANY, AN OHIO CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Prior to the 1994 Amendments to the Bankruptcy Code, 11 U.S.C. § 546(a) provided that preference actions under § 547 of the Code must be brought within two years of the appointment of a trustee under the Bankruptcy Code; 11 U.S.C. § 1107(a) provides that a Chapter 11 debtor-in-possession is "[s]ubject to any limitations on a trustee serving in a case under this chapter." The issue presented is whether in a Chapter 11 proceeding commenced prior to October 22, 1994, wherein the debtor remains in possession, the two-year statute of limitations to bring a preference avoidance action commences anew upon conversion of the case from Chapter 11 to Chapter 7 such that the appointed Chapter 7 Trustee is given two additional years to bring preference actions regardless of when the case was filed, which could occur five, ten or even more years after the commencement of the bankruptcy case.

LIST OF INTERESTED PARTIES

The parties to the proceedings below were Petitioner, Robert P. Mosier, Chapter 7 Trustee for the bankruptcy estate of IRFM, Inc., formerly dba Irvine Ranch Farmers Market, and Respondent The Kroger Co.

Respondent is a Corporation formed in the State of Ohio whose shares are publicly traded. Pursuant to Rule 29.6, Respondent has no Parent Corporations or non-wholly owned subsidiaries.

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Respondent The Kroger Co., an Ohio Corporation, respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the opinion of the Court of Appeals for the Ninth Circuit reported at 65 F.3d 778 (9th Cir. 1995).

STATEMENT OF THE CASE

At issue in this case is the statute of limitations for the commencement of an avoidance action under § 546(a)(1) of the Bankruptcy Code as it existed prior to the amendment of § 546(a)(1) by the Bankruptcy Reform Act of 1994. The Ninth Circuit held that in a case commenced as a Chapter 11 proceeding, where the debtor remains in possession, the statute of limitations for the commencement of an avoidance action under pre-amended § 546(a)(1) started to run at the time of the entry of the Order for Relief and did not start anew upon conversion of the case to a Chapter 7 proceeding.

Given the amendment by Congress to § 546(a)(1), wherein Congress clarified § 546(a)(1) and thus remedied the Circuit Courts' inconsistent interpretations of pre-amended § 546(a)(1), the impact of the decision in this case will be of limited significance. Likewise, the traditional rules of statutory construction and the stated purposes behind statutes of limitations (*i.e.*, finality, certainty and the right to be free of stale claims) dictate that the Ninth Circuit reached the correct result in its interpretation of pre-amended § 546(a)(1).

REASONS FOR DENYING THE WRIT

I.

THE BANKRUPTCY REFORM ACT OF 1994 OBVIATES THE NEED TO RESOLVE ANY CONFLICT OVER THIS ISSUE AMONG THE CIRCUIT COURTS OF APPEALS.

Respondent acknowledges that the decision of the Ninth Circuit Court of Appeals reported at 65 F.3d 778 (9th Cir. 1995), *In re IRFM*, conflicts with decisions in the Fourth, Fifth, and Seventh Circuits[1]; however, because of the enactment on October 22, 1994 of the Bankruptcy Reform Act of 1994 (the "1994 Reform Act"), resolution of this conflict by this Court would be merely academic and have de minimis impact.

Prior to its amendment by § 216 of the 1994 Reform Act, § 546(a) of the Bankruptcy Code provided as follows:

> An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of —
>
> . . . . . .
>
> (1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302 or 1202 of this title; or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. § 546(a) (prior to 1994 amendments).

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1. *In re Maxway Corp.*, 27 F.3d 980 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 580, 130 L. Ed. 2d 495 (1994); *In re Mortgage America Corp.*, 831 F.2d 97 (5th Cir. 1987); *Gleischman Sumner Co. v. King, Weiser, Edelman & Bazar*, 69 F.3d 799 (7th Cir. 1995).

Along with the Ninth Circuit, the Second, Third, and Tenth Circuits have found that Bankruptcy Code § 546(a)(1) applies to debtors in possession, and that the statute of limitations begins to run against the debtor in possession upon the filing of the bankruptcy petition.[2] Likewise, the Eighth, Ninth, and Tenth Circuit Courts of Appeals have held that the two year statute of limitations does not begin to run anew upon conversion of the Chapter 11 case to Chapter 7.[3]

Congress has remedied the Circuit Courts' inconsistent interpretations of §546(a)(1) in § 216 of the 1994 Reform Act. As amended by the 1994 Reform Act, Bankruptcy Code § 546(a) now provides the following:

> An action or proceeding under §§ 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of —
>
> (1) the later of —
>
> (A) 2 years after the entry of the order for relief; or
>
> (B) 1 year after the appointment or election of the first trustee under section 702,

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2. *In re McLean Industries, Inc.*, 30 F.3d 385 (2d Cir. 1994); *U.S. Brass & Copper Co. v. Caplan (In re Century Brass Prods, Inc.)*, 22 F.3d 37 (2d Cir. 1994); *Construction Mgt. Servs., Inc. v. Manufacturers Hanover Trust Co. (In re Coastal Group, Inc.)*, 13 F.3d 81 (3d Cir. 1994); *In re Softwaire Centre Int'l, Inc.*, 994 F.2d 682 (9th Cir. 1993); *Zilkha v. Leighton*, 920 F.2d 1520 (10th Cir. 1990).

3. *In re San Joaquin Roast Beef*, 7 F.3d 1413 (9th Cir. 1993); *McCuskey v. Central Trailer Services, Inc.*, Ltd., 37 F.3d 1329 (8th Cir. 1994); *In re M & L Business Machine Company, Inc.*, 75 F.3d 586 (10th Cir. 1996).

> 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. § 546 (1994).

Through this amendment, Congress has clarified § 546(a)(1) by establishing an outside limit for bringing avoidance actions, applicable to all parties.[4] Specifically, in a Chapter 11 case, as long as the debtor remains in possession, actions must be commenced within two years. Trustees under all chapters appointed within the initial two year period are subject to the same deadline, except that the time may be extended to allow trustees one additional year after appointment to commence actions.

The amendment renders all of the Circuit Courts' interpretations of pre-amended Code § 546(a)(1) irrelevant. This Court therefore does not need to resolve the conflict.

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4. As stated in *In re M & L Business Machine Company, Inc.*, supra, ". . . 'In light of the fact that § 546(a)(1) was amended against the backdrop of inconsistent case law and that Congress chose to underscore the importance of a statute of limitations rather than the various roles of trustees under different chapters,' [citing *In re Dryland Marina, Inc.*, 180 B.R. 487, 490 (W.D. Mich. 1995)], we consider this 1994 amendment to have been a clarification, rather than a change, in the law." *Id.* at 590.

II.

A SPLIT AMONGST THE CIRCUIT COURTS OF APPEALS IN INTERPRETING PRE-AMENDED CODE § 546(a) HAS DE MINIMIS IMPACT, AFFECTING LESS THAN 1% OF THE CASES PENDING AS OF DECEMBER 31, 1995.

Although the 1994 Reform Act is effective upon enactment, it generally does not apply to pending cases.[5] Respondent acknowledges that there are cases remaining which will be governed by the existing, and conflicting, interpretations of pre-amended § 546(a)(1). The number of these cases, however, is rapidly decreasing in time such that any remaining conflict has a de minimis impact.

After the Tenth Circuit Court of Appeals decision of *Zilkha v. Leighton*, *supra*, in 1990, the first circuit court to decide that § 546(a)(1) applied to debtors in possession, bankruptcy practitioners, professors and lecturers have advised counsel for debtors in possession and debtors in possession to file avoidance actions within two years of the entry of the order for relief. Practically speaking then, the conflict in the Circuit Courts of Appeals affects only that number of chapter 11 cases which were filed more than two years before the December 1990 *Zilkha* decision and in which the debtors are still in possession.

The Administrative Office of the United States Courts reports that of the 1,119,324 bankruptcy cases pending as of December 31, 1995, only 1.0% are chapter 11 cases filed before January 1, 1990. Further, the issue before this Court will arise only in that portion of the 1.0% of cases pending in which an avoidance action exists but has yet to be filed. Thus, given the statistically small number of cases affected by this issue, which

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5. Bankruptcy Reform Act of 1994, § 702.

continues to decrease over time, a conflict amongst the Circuits in interpreting pre-amended Code § 546 has a de minimis impact.

III.

THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY INTERPRETED PRE-AMENDED § 546(a) OF THE BANKRUPTCY CODE.

The Ninth Circuit Court of Appeals' interpretation of pre-amended Code § 546(a)(1) correctly follows the traditional rules of statutory construction, adheres to the underlying purposes of statutes of limitations, and should not be disturbed. The Ninth Circuit, in following this Court, has stated "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[6] In *In re Softwaire Centre International*, *supra*, the Ninth Circuit held that § 1107(a) by its terms subjects debtors in possession to the limitations imposed on a trustee, finding that a Chapter 11 debtor in possession is the functional equivalent of an appointed trustee. In so holding, the Ninth Circuit relied on the legislative history of § 1107 and stated:

> [Section 1107] places a debtor in possession in the shoes of a trustee in every way. The debtor is given the rights and powers of a chapter 11 trustee. He is required to perform the functions and duties of a chapter 11 trustee (except the investigative duties). He is also subject to any limitations on a chapter 11 trustee . . . .

Softwaire Centre International, 994 F.2d at 683, citing S.

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6. *In re Softwaire Centre International*, 994 F.2d at 682 citing *Kelly v. Robinson*, 479 U.S. 36, 43, 107 S. Ct. 353, 357, 93 L. Ed. 2d 216 (1986).

Rep. No. 95-989, 95th Cong., 2nd Sess. 116 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5902. *Accord*, H. Rep. No. 95-595, 95th Cong., 2nd Sess. 404 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6360.

Further, in *In re San Joaquin Roast Beef, supra,* the Ninth Circuit, when faced with the issue of whether the statute of limitations re-starts with the appointment of a second trustee, found that the most logical interpretation of § 546(a) is that the statute of limitations begins running from the date the first trustee is appointed and that all subsequent trustees are subject to the same statute of limitations.

Thus, in this case, *where no Chapter 11 Trustee was appointed,* the Ninth Circuit correctly concluded that the statute of limitations began running at the time this case was commenced, and the conversion of the case to Chapter 7, and the appointment of a Chapter 7 Trustee, did not "start the clock ticking anew."[7]

In its petition to this Court for a writ of certiorari, Petitioner artfully argues that the decision in the present case creates a direct conflict with *In re San Joaquin Roast Beef*, and that the end result is that Chapter 11 trustees are vested with greater rights than Chapter 7 Trustees.[8] Petitioner's argument fails, however, because *San Joaquin Roast Beef* is factually distinguishable and because Petitioner ignores the underlying purpose behind the statute of limitations.

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7. *IRFM, supra,* at 780.

8. To the contrary, and as more fully discussed herein, the Ninth Circuit held in *San Joaquin Roast Beef* that the statute of limitations did not start running anew after the proceeding was converted from Chapter 11 to Chapter 7.

In *In re San Joaquin Roast Beef, supra,* a Chapter 11 Trustee was appointed within ten months after the commencement of the case. Subsequently, the case was converted to a Chapter 7 proceeding, and the appointed Chapter 7 Trustee commenced a preference action more than two years after the appointment of the Chapter 11 Trustee, arguing that it should get a new independent two year statute of limitations. The Ninth Circuit held:

> A plain reading of section 546(a) is that the two-year statute of limitations begins running from the date the first trustee is appointed and that all subsequent trustees are subject to the same two-year statute of limitations.

San Joaquin Roast Beef, 7 F.3d at 1416.

Moreover, the purposes of statutes of limitations are to bar the bringing of stale causes of actions, and to put opposing parties on notice when actions can no longer be instituted. This Court has stated "Statutes of Limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified time period and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."[9]

Since preferential transfers generally relate to the period between ninety days prior to the filing of the bankruptcy petition, or in some circumstances one year prior to bankruptcy, and since a Chapter 11 proceeding can remain pending for several years prior to being converted to a Chapter 7 proceeding, then, following Petitioner's argument, if an appointed Chapter 7

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9. *United States v. Kubrick*, 444 U.S. 111, 117, 100 S. Ct. 352, 356 (1979).

Trustee is given two additional years to bring preference actions, said actions can occur five, ten, or even more years after the commencement of the bankruptcy case.[10]

This was a concern to the Court in *In re Tusa Florida, Inc.*, 186 B.R. 542, 545 (S.D. Fla. 1995), when it stated "A ruling that the two-year limitations period could run anew upon the appointment of a trustee subsequent to a debtor in possession could lead to absurd results. For example, a debtor may be a debtor in possession for six years. Thereafter, if a trustee is appointed, opposing parties could be subject to a new two-year statute of limitations. . . . These results are clearly contrary to the purposes of the statute of limitations."[11]

In fact, it is apparent that Congress recognized the need for finality and certainty under § 546 when it amended § 546(a) to make it clear that the limitations period runs from the later of two

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10. In the instant case, for example, the transactions which were alleged to be preferential transfers took place during the period of July 22, 1987 through July 21, 1988. The Chapter 11 proceeding was commenced on July 22, 1988. On October 3, 1989, the case was converted to a Chapter 7 proceeding, and on October 11, 1991, or approximately four years after the alleged preferential transfers took place, the underlying action was commenced. *It should be noted that after a trial on the merits, the Bankruptcy Court ruled in favor of Respondent, finding that the transfers were made in the ordinary course of business and, therefore, not preferential under § 547(c).*

According to the Administrative Office of the United States Courts, there are presently Chapter 11 cases still pending which were commenced shortly after the effective date of the Bankruptcy Reform Act of 1978 (October 1, 1979). Thus, following Petitioner's argument, it is possible that an avoidance action could be commenced today by a Chapter 7 Trustee, under the pre-amended § 546, for a transaction that occurred close to twenty years ago.

11. *See also In re Luria Steel and Trading Corporation*, 164 B.R. 293 (Bankr. N.D. Ill. 1994).

years from the entry of the Order for Relief or one year from the date of the appointment or election of the first trustee if such trustee is appointed or elected within two years of the entry of the Order for Relief. In other words, under amended § 546(a), the statute of limitations will not extend beyond three years from the filing of the petition.

Thus, the Ninth Circuit reached the correct result in its interpretation of § 546(a)(1), and the soundness of its decision argues against review by this Court.

CONCLUSION

The Ninth Circuit Court of Appeals correctly held that the two-year statute of limitations period imposed pursuant to pre-amended Code § 546(a) applies to debtors in possession, and that a new two year limitations period was not created as a result of the conversion of the underlying case to a Chapter 7 proceeding or the appointment of a Chapter 7 Trustee. Likewise, the Bankruptcy Reform Act clarified Code § 546(a) to resolve the conflict that exists amongst the various circuits; thus, any remaining conflict amongst the Circuits affects only a small number of cases which continues to decrease with time.

WHEREFORE, for the reasons set forth herein, Respondent requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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